SUPREME COURT, U.S.
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No. 94-814

In The

Supreme Court of the United States

October Term, 1994

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN, MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN, MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN, AND ROBERT LES,

Petitioners,

vs.

BRUCE S. MARKS, KATHY STECK, EMANUEL LORENZO, LYDIA COLON, LILLIAN CRUZ, DIANA IRIZARRY, RUTH MARTINEZ, ZORAIDA RODRIGUEZ, YESENIA VASQUEZ, AND THE REPUBLICAN STATE COMMITTEE,

-and-

WILLIAM STINSON, THE WILLIAM STINSON CAMPAIGN, AND THE PHILADELPHIA COUNTY BOARD OF ELECTIONS (MARGARET M. TARTAGLIONE, JOHN F. KANE, ALEXANDER Z. TALMADGE, JR.),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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In their Brief in Opposition, respondents urge this Court to deny the petition for a writ of certiorari because the issue presented is moot. Respondents argue that because the Republican controlled Pennsylvania Senate resolved respondent Bruce S. Marks' election contest in favor of Marks (a Republican) on April 28, 1994 and because a general election was held on November 7, 1994 (an election which respondent Marks lost), the question presented by petitioners (legitimate absentee ballot voters) is moot. Respondents' suggestion of mootness should be rejected.[1]

To start, respondents neglect to inform this Court that the United States Court of Appeals for the Third Circuit considered whether the resolution of Marks' election contest by the Pennsylvania Senate rendered the case moot, and concluded that it had not. *Marks v. Stinson*, Nos. 94-1474, 94-1475, 94-1476, 94-1481 and 94-1482 (3d Cir.) ("*Marks II*") at 6 n. 2, App. at A6-7. The Pennsylvania Senate has agreed at every juncture in this litigation to yield to and abide by whatever rulings were made by the federal courts, thus leading the Third Circuit to conclude that "a reversal by this court might lead the Senate to reverse its position [thus giving petitioners] effective relief...." *Id.*

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[1]Petitioners note that respondents have, at every turn in this litigation, fought to keep petitioners from being heard. Respondents fought petitioners' mandamus petition (which was treated by the Third Circuit as a motion to intervene and was granted); respondents fought petitioners' intervention in the district court on remand from the Third Circuit; and, respondents fought petitioners in the Third Circuit on appeal from the decision to certify Marks, the loser of the November 2, 1993 special election as the winner thereof. Respondents now fight petitioners in this Court. Petitioners have only been interested in protecting the fundamental right to vote (the right from which all other rights flow), and find it curious that respondents have fought so hard to keep petitioners from even being heard with respect to that important right.

Next, while respondents recognize that there exists an exception to the mootness doctrine, they simply make the bald conclusion that the exception does not apply. An analysis both of the exception and the facts *sub judice* make clear that the exception does apply.

It is well established by this Court, and correctly stated by respondents, that federal jurisdiction will extend to cases and controversies which have been rendered moot during the course of the litigation if two circumstances are present:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)).

The challenged action in this case was simply too short in duration to be fully litigated.[2] This Court's discussion of the applicability of the mootness doctrine contained in *Roe v. Wade*, 410 U.S. 113 (1973), is instructive. In rejecting a claim that Roe's constitutional challenge to a Texas abortion criminal statute was moot, this Court first noted: "Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy...." *Id.* at 124. This Court went on to state:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or

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[2]Importantly, that the case was not moot at the time the Petition for a Writ of Certiorari was filed. The case did not become moot until November 7, 1994 when respondent Marks lost his bid for the position of senator of Pennsylvania's Second Senatorial District.

> certiorari review, and not simply at the date the action is initiated. But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Id. at 125 (citations omitted).

This Court should not resolve the mootness question presented *sub judice* any differently that it resolved the mootness question in *Roe v. Wade*. Here, the term of the election was a significant fact in the litigation, and was a period so short that it passed prior to completion of the appellate process. Here, unless this Court takes review of this case, federal courts will remain free to declare the losers of state elections the winners thereof in the absence of mathematical certainty that the loser in fact won the election. Moreover, terms of office (even following a general election and not only following special elections to fill a vacancy for an unexpired term) will likely expire prior to review by this Court. The improper intrusion into state electoral affairs by the federal court here "truly could be 'capable of repetition, yet evading review.'" *Id.* In addition, and contrary to respondent's assertions, it is not "highly unlikely that Petitioners would be subject to the same action again." Brief in Opposition at 14.

As respondents full well know, many of the Petitioners (*e.g.*, Ida Dougherty, Mary Sullivan and Mary Mendoloski) are elderly, disabled women who voted by absentee ballot in the November 2, 1993 Special Election, and who had voted by absentee ballot in many prior elections on account of their disabilities. Thus, that which caused them to vote by absentee ballot in the November 2, 1993 special election was not "temporary." Brief in Opposition at 14. Accordingly, any future declaration by the federal court in the Eastern District of Pennsylvania that the loser of a state election should be declared the winner thereof, without mathematical certainty that the loser would have won, most certainly would subject at least three petitioners to the same action again -- *to wit*, a court-imposed and court-selected governmental representative.

The principal case relied upon by respondents in support of their mootness argument, *Hall v. Beals*, 396 U.S. 45 (1969), is inapposite. The only similarity between *Hall* and the instant case is that both deal with elections. *Hall* involved a constitutional challenge to a Colorado six-month residency requirement. By the time the case was decided by this Court, the election at which petitioner therein had wanted to vote had passed and petitioner therein had satisfied the six month residency requirement. However, the linchpin to this Court's finding of mootness was that, following the challenge to the six month residency requirement, the Colorado Legislature changed the residency requirement from six months to two months. Under the new residency requirement law, there was no case or controversy:

> We review the judgment below in light of the Colorado statute as it now stands, not as it once did. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid

> advisory opinions on abstract propositions of law.

Id. at 48. In the case *sub judice*, the absence of a present, live controversy is a function only of the fact that the challenged action was, in its duration, too short to be fully litigated before its expiration -- a fact that will not foreclose review by this Court of the important constitutional question presented.

If this Court dismisses the petition for a writ of certiorari as moot, then nothing will stop the federal courts from again transforming the losers of state elections into the winners thereof. All future appellate challenges to such federal court action would likewise be dismissed as moot and thus the issue presented would always evade review by this Court. Further, at least three of the petitioners *sub judice* would again be subjected to the unlawful judicial interference with state elections.

Accordingly, and for all of the reasons previously stated, a writ of certiorari should issue to correct the opinion and judgment of the United States Court of Appeals for the Third Circuit, dated August 18, 1994.

Respectfully submitted,

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